FILE COPY

No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1942

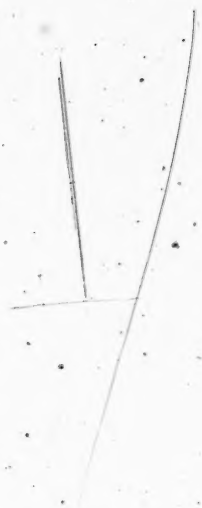
WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA EX REL. GENE MCCANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS



INDEX

CITATIONS

Cases:

480526—42——1

Cases—Continued. Page

Cases—Continued.

Cases—Continued.

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 79

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA EX REL. GENE McCANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court below (R. 8–12) and the dissenting opinion of Judge Chase are reported in 126 F. (2d) 774.

JURISDICTION

The order of the circuit court of appeals was entered on March 31, 1942 (R. 13). The petition for a writ of certiorari was filed April 23, 1942, and was granted April 27, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Has a circuit court of appeals jurisdiction to entertain a petition for a writ of *habeas corpus* attacking a judgment of conviction from which an appeal is pending in that court?

2. May a person accused of a crime against the United States waive his right to the assistance of counsel and later, with the approval of the court and the District Attorney, waive his right to a trial by jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and pertinent statutes are set forth in Appendix A, *infra*, pp. 53–55.

STATEMENT

Respondent was convicted on July 22, 1941, in the United States District Court for the Southern District of New York upon an indictment in six counts for using the mails to defraud, a violation of Section 214 of the Criminal Code, 18 U. S. C. 338, and was sentenced to imprisonment for six years and to pay a fine of $600 (R. 2). He appealed to the court below, and the trial court fixed his bail at $10,000 (R. 8). Upon application by respondent the court below reduced the bail to $1,500.[1] The appeal is still pending in that court.

[1] In its opinion in the *habeas corpus* proceeding, the court below stated that respondent's bail had been reduced to $1,000 (R. 8). This statement appears to be erroneous since, in a *per curiam* opinion on file with the clerk of the

which has from time to time extended the time for filing a bill of exceptions (R. 8).[2]

At the hearing on the application for a reduction in bail, the circuit court of appeals suggested to respondent that he file a petition for a writ of *habeas corpus* to test whether his conviction was void because he was not represented by counsel when he waived a trial by jury (R. 8; Appendix B, *infra*, pp. 56–57). Respondent filed such a petition, later superseded, in the circuit court of appeals.[3] This petition alleged that respondent was tried and convicted without assistance of counsel, and without being advised that he was entitled to such assistance, although he never waived his right thereto. The petition also alleged that respondent was not in a position to choose intelligently whether to be tried without a jury, that he was

---

circuit court of appeals, written in connection with an earlier application for *habeas corpus* which the court considered as an application for a reduction in bail, the court ordered a reduction to $1,500 rather than $1,000. A copy of the *per curiam* opinion has been filed with the Clerk of this Court and is reprinted as Appendix B, *infra*, pp. 56–57.

[2] On April 9, 1942, the court below extended the time for filing a bill of exceptions until 90 days after the date upon which respondent is personally served with a copy of any order that may be made by this Court reversing the order of the court below in the *habeas corpus* proceeding. A copy of the order extending the time for filing a bill of exceptions has been filed with the Clerk of this Court and is reprinted as Appendix C, *infra*, pp. 58–62.

[3] A certified copy of this petition, which was superseded by the petition appearing at R. 2–3 has been filed with the Clerk of this Court and is reprinted as Appendix D, *infra*, pp. 63–67.

not advised in his choice by the court, the District Attorney, or counsel, and that the judge perfunctorily approved the waiver without familiarizing himself with the charge against respondent or advising respondent of the significance of his acts. (Appendix D, *infra*, pp. 63–67.) Upon this petition, Circuit Judge A. N. Hand issued a writ of *habeas corpus* returnable on March 12, 1941, before the circuit court of appeals.[4]

After the hearing on March 12, this first petition, which raised controversial issues of fact, was withdrawn and a new petition (R. 2–3) was filed which did not repeat the allegations made in the first petition that the waivers were unwitting and involuntary. Instead, the petition set forth only that the respondent did not have the assistance of counsel at any of the proceedings upon his indictment and that he was tried without a jury upon his own motion, the United States Attorney consenting thereto (R. 2).

To this second petition the marshal made a return (R. 4–7), setting forth the following facts concerning the trial of respondent:

---

[4] Although Judge A. N. Hand signed the writ issued for the purpose of inquiring into the causes of the respondent's detention (R. 1), this was not a *habeas corpus* proceeding before a judge of a circuit court of appeals, authorized by 28 U. S. C. 452 and 463 (a), for the writ was made returnable before the court (R. 1) and was considered by the court *en banc* (R. 8), and the order made thereon was an order of the court (R. 13). Cf. *Carper* v. *Fitzgerald*, 121 U. S. 87.

When respondent was called upon to enter his plea to the indictment, the trial judge advised him to retain counsel, but respondent refused, "stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself" (R. 4). When the case was called for trial, the trial judge inquired of respondent whether he had counsel and respondent repeated that "he desired to represent himself" for, although he was not admitted to the bar, "he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be" (R. 5). Various preliminary proceedings had been initiated by respondent prior to his trial and it also appeared that he had represented himself in extensive civil litigation (R. 5–6, 9).

Upon the trial, respondent moved to have the case tried by the judge without a jury. "There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney" (R. 5) following which respondent's motion was granted on consent of the Assistant United States Attorney. Thereafter respondent signed the following waiver which was consented to by the As-

sistant United States Attorney and approved by the district judge (R. 7):

> I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Respondent represented himself throughout the ensuing trial which extended for two and a half weeks. Upon conviction, he filed an appeal which he has attempted to perfect in person, although the trial court and appellate court each suggested to him at least once the advisability of retaining counsel (R. 5).

This return was not traversed.

The court below accepted the statement of facts in the return as accurate (R. 9–10) and, following argument on March 20, 1941, filed an opinion holding the conviction to be unlawful and directing that the respondent be released (R. 8–11). One judge dissented (R. 12). An order was entered directing that the respondent be released (R. 13)—

> upon condition that [he] the relator shall post bail with good and sufficient surety in the amount of $1,000 to secure his appearance to prosecute his appeal now pending in this Court * * * and also to secure his appearance for his further trial and prosecution in the United State District Court upon said indictment.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that it had jurisdiction to entertain the petition for a writ of *habeas corpus*.

2. In holding that, because respondent was not represented by counsel when he waived a trial by jury, respondent was unlawfully convicted.

3. In failing to dismiss the petition for a writ of *habeas corpus*.

4. In entering an order directing respondent's release.

SUMMARY OF ARGUMENT

I

The circuit court of appeals issued the writ of *habeas corpus* not as an auxiliary writ to prevent interference with its appellate jurisdiction but as a substitute for a pending appeal in order to void the conviction without awaiting preparation of a bill of exceptions.

The circuit court of appeals had no jurisdiction thus to substitute the extraordinary remedy of *habeas corpus* for the normal remedy of appeal. The circuit courts of appeals have power to issue only such writs as are "necessary for the exercise of their respective jurisdictions." Judicial Code, Sec. 262, 28 U. S. C. 377. Their jurisdiction is created by statute and is specifically limited "to review by appeal." Judicial Code, Sec. 128; 28 U. S. C. 225. It follows from the very words of

the statutes that the circuit courts of appeals have jurisdiction to issue only the original writs necessary to review by appeal, including *habeas corpus*, and may not enlarge their jurisdiction by substituting review by an original writ. This interpretation is supported by the great weight of authority.

Broader considerations point to the same conclusion. The familiar policies which deny review at interlocutory stages and which cause the courts to refuse to issue *mandamus*, prohibition, and *habeas corpus* when other remedies are available, call for the strict interpretation of Section 262. Congress has expressly confided to this Court and the district courts power to issue writs of *habeas corpus*; hence there is no constraint to find such power in the circuit courts of appeals. On the contrary, the power would be highly inconvenient, for the circuit courts of appeals have no facilities for hearing the cases in which *habeas corpus* is most appropriate—those involving disputed facts de hors the record. Respondent's remedy (assuming *habeas corpus* at this stage to be appropriate) was to apply for the writ to the district court or, possibly, to this Court, but not to the circuit court of appeals.

The same result obtains even if we assume to be correct the decisions holding that review in the circuit court of appeals by an original writ as a substitute for appeal is proper whenever the ex-

cumstances imperatively demand that form of intervention. In this case there was no showing of such circumstances.

II

There is no constitutional or other bar to the waiver of the right to a trial by jury by a defendant who is aware of his rights and capable of making an informed choice, even though the defendant has also waived his right to the assistance of counsel.

It is now settled that a defendant in a federal court may waive his right to a trial by jury and may be tried by the court. The right so to do is supported not only by this Court and many decisions of circuit courts of appeals, but has been implicitly recognized and approved by the Congress. And the historical language and background of the constitutional provisions relating to trial by jury establish that such trial is a right which may be waived by its beneficiary, and is not a mandatory requirement to be imposed against his will.

It is equally plain that the right to counsel may be waived. Since, therefore, a defendant may waive either of these rights, there is no warrant in authority or in logic for concluding that regardless of the circumstances he can never waive both rights in the same proceeding. Waiver of counsel does not preclude waiver of the right to a jury trial, nor does the Constitution require a de-

fendant who desires to be tried by the court to obtain counsel to effect the waiver. The controlling statutes confer upon an accused the power to manage his own cause; this power must carry with it the power to waive any constitutional privilege, including jury trial, when the accused deems such waiver to be to his advantage. Other questions arising in the course of a trial may call for much greater technical legal knowledge than the essentially practical judgment as to whether to be tried with or without a jury; no consideration of competence, therefore, warrants a distinction between the power of a defendant without counsel to waive his right to a jury trial, and his power to conduct his own cause for all other purposes.

The unquestionable right of a defendant who has intelligently waived counsel subsequently to plead guilty is a persuasive analogy. Since a defendant may plead guilty without counsel, it would seem to follow that he may do the lesser thing and waive only the right to a trial by jury. A trial court, in considering whether to make effective such a waiver, may appropriately take the waiver of counsel into account as an important factor. But there is no reason why in the circumstances presented by this case, the trial court cannot make effective a waiver of the right to a jury trial by a defendant who has deliberately chosen to be without counsel.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION TO ISSUE THE WRIT OF HABEAS CORPUS

Congress, when it created the circuit courts of appeals, did not extend to them the same power to issue writs of *habeas corpus* as had been conferred upon all other federal courts by Section 751 of the Revised Statutes.[5] The omission was not supplied in the Judicial Code or in the Act of February 13, 1925, although before either was enacted it had been authoritatively decided that the power could not be added by implication. See *Whitney* v. *Dick*, 202 U. S. 132.[6] But while Congress thus deliberately denied the circuit courts of appeals power to issue original writs of *habeas corpus* in independent proceedings, it did grant those courts some power to issue the writ by ex-

[5] Now found in 28 U. S. C. 451, *viz:* "The Supreme Court and the district courts shall have power to issue writs of *habeas corpus*."

[6] Prior to that decision it had been held by lower courts that the circuit courts of appeals had power to issue writs of *habeas corpus*. E. g., *Ex Parte Moran*, 144 Fed. 594 (C. C. A. 8). *Whitney* v. *Dick*, *supra*, however, has been followed consistently. *Sweetney* v. *Johnston*, 121 F. (2d) 445 (C. C. A. 9), certiorari denied, 314 U. S. 607; *In re Anderson*, 117 F. (2d) 939, 940 (C. C. A. 9); *DeMaurez* v. *Swope*, 110 F. (2d) 564 (C. C. A. 9); *Ferguson* v. *Swope*, 109 F. (2d) 152 (C. C. A. 9); *Smith* v. *Johnston*, 109 F. (2d) 152, 156 (C. C. A. 9); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10).

tending to them the power, first granted to all federal courts in Section 14 of the Judiciary Act of 1789 [7] and now found in Section 262 of the Judicial Code [8]—

> to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usage and principles of law.

Consequently, the court below had jurisdiction to issue the writ of *habeas corpus* only if its use was "necessary" to the exercise of its appellate jurisdiction.

We submit that there was no such necessity. The writ of *habeas corpus* was not issued to prevent or remove interferences with the jurisdiction of the circuit court of appeals. The writ was issued as a complete substitute for ordinary appellate procedure. This is apparent on the face of the opinion below.

In its opinion the circuit court of appeals stated that the respondent's difficulties in preparing a bill of exceptions might prevent it from reviewing the judgment of conviction on appeal and would certainly hamper it (R. 9). Had the circuit court of appeals then ordered respondent's release to the extent necessary to enable him to prepare his appellate papers, or to bring him before that court in

---

[7] 1 Stat. 81.

[8] 28 U. S. C. 377.

connection with the hearing or disposition of his appeal, then the writ would in a true sense have been auxiliary to the proper exercise of the normal appellate jurisdiction. But the court below did more; in its opinion it held on the merits that the conviction was a nullity, and it directed that the respondent should be discharged from custody (R. 11).

The order entered by the court (R. 13), it is true, does not follow literally the logic of the opinion. The order provides that the respondent shall be released only upon condition that he post a bond of $1,000 to prosecute his appeal, and, if carried out literally, would accomplish nothing more than a bail order giving the assurance that, as far as the court below was concerned, the appeal would be successful. But that is not the fair intendment of the proceeding as a whole. The court below would not have indulged in such legal complexities for the simple purpose of effecting a $500 reduction in bail.* The order must be read in the light of the opinion and particularly of the statement that to enter a bail order releasing respondent without a bond would be inadequate because he would still be confronted with the necessity of perfecting his bill of exceptions (R. 9). The obvious intention was to direct that the respondent be released subject only to his posting bond to appear for a new trial

*An earlier order had fixed bail at $1,500. See p. 2, *supra*.

or to prosecute his appeal in the event that this Court should reverse the order releasing him.

This view, moreover, is supported by the court's order of April 9, 1942, extending respondent's time for filing a bill of exceptions "for a period of ninety (90) days from the personal service on the defendant-appellant of a copy of any order that may be made by the United States Supreme Court reversing the aforesaid order of this Court which granted the defendant-appellant's writ of *habeas corpus* and directed his discharge" (Appendix C, pp. 58–59, *infra*). It is entirely clear, therefore, that the court below issued the writ of *habeas corpus* as a substitute for a pending appeal in order to review, before the appeal was perfected, the validity of respondent's conviction upon a trial in which he waived both counsel and jury.[10]

[10] If the order of the court interpreted literally does sum up the total effect of the *habeas corpus* proceedings, then it is clear that the circuit court of appeals had no authority to proceed by *habeas corpus*. Upon that interpretation the effect of the order and opinion taken together is to admit respondent to bail and to inform him that his appeal will succeed upon the point raised by *habeas corpus*. This will aid respondent in preparing his bill of exceptions—especially if this Court decides the case on the merits—and therefore, in a sense, issuance of the writ will have forwarded the appeal and have been auxiliary to the court's exercise of its appellate jurisdiction. But to use the writ of *habeas corpus* for such a purpose is a perversion. *Habeas corpus* lies to free from custody a person whose confinement is unlawful and not to inform a convicted defendant how to prepare a bill of exceptions. Compare *McNally* v. *Hill*, 293 U. S. 131. The fact that the respondent may have been poor

The heart of the jurisdictional issue, therefore, is whether Section 262 empowers a circuit court of appeals to review upon a petition for *habeas corpus* a judgment of conviction from which an appeal is pending before it. Although there is no conflict upon this issue in respect of the writ of *habeas corpus*, there are differences of opinion, both in the judgments of this Court and in those of the circuit courts of appeals, concerning whether Section 262 authorizes the issuance of other original writs as complete substitutes for the normal appellate processes where the circumstances imperatively demand that form of intervention. See pp. 26–27, *infra*. This uncertainty concerning the scope of Section 262 has been recognized both by this Court and by circuit courts of appeals. *Ex parte Bakelite Corp.*, 279 U. S. 438, 448; *Ex parte Joins*, 191 U. S. 93, 102; *In re Eastman Kodak Co.*, 48 F. (2d) 125 (C. C. A. 3); *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485 (C. C. A. 10). In view of the inescapable analogy in this respect of one extraordinary writ to another, we shall discuss the general problem as well as the immediate question of the power to issue *habeas corpus*, and

---

and lacked the aid of counsel is immaterial to this issue for if this be the case, he could appeal *in forma pauperis* and have counsel appointed. The extent to which the writ has been misused, if this interpretation of the order is correct, is sufficiently shown by the fact that the court holds on bail, to prosecute an appeal, a man whose conviction and resulting confinement it has already held to be unlawful.

shall show (A) that Section 262 grants to the circuit courts of appeals power to issue only such writs as are truly auxiliary and not substitutional; and (B) that even if the broader power exists in extraordinary cases, it was not called into being in the present case by any extraordinary circumstance.[11]

[11] We shall assume for the purposes of the present case that filing a petition for a writ of *habeas corpus* in this Court (compare *Ex parte Mirzan*, 119 U. S. 584, with *In re Sawyer*, 124 U. S. 200, and *Ex parte Terry*, 128 U. S. 289, 301–302) or in a district court, would have been an appropriate procedure for raising the issue of whether respondent was deprived of his constitutional rights by a trial, at his own deliberate request, without counsel and without jury. In other words, we shall assume that the conviction could be collaterally attacked on the grounds stated and that under the circumstances there would have been no abuse of discretion in issuing the writ, if the circuit court of appeals had had jurisdiction so to do.

We feel warranted in making this assumption for two reasons. First, in spite of considerable confusion in the whole body of the decisions of this Court, the recent decisions seem adequately to support the statement that "*if it be found* that the court had no jurisdiction to try the petitioner, or *that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available.*" *Bowen* v. *Johnston*, 306 U. S. 19, 24 [italics added]. See, also, *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *Callan* v. *Wilson*, 127 U. S. 540 (jury trial); *Ex parte Bain*, 121 U. S. 1 (indictment); *In re Nielsen*, 131 U. S. 176 (double jeopardy); *Hawaii* v. *Mankichi*, 190 U. S. 197 (jury trial); *Moore* v. *Dempsey*, 261 U. S. 86 (due process); *Johnson* v. *Zerbst*, 304 U. S. 458 (assistance of counsel). Contra: *Ex parte Harding*, 120 U. S. 782 (compulsory process to obtain witnesses); *In re Schneider*, 148 U. S. 162 (jury trial); *Andrews* v.

A. *The circuit courts of appeals have no power to review convictions by writ of habeas corpus*

The jurisdiction of the circuit courts of appeals is wholly statutory.[12] In ordinary civil and criminal cases, their jurisdiction is derived exclusively from Section 128 of the Judicial Code,[13]

[12] *Leimer* v. *State Mut. Life Assur. Co.*, 106 F. (2d) 793 (C. C. A. 8), appeal dismissed, 107 F. (2d) 1003; *In re Philadelphia & Reading Coal & Iron Co.*, 103 F. (2d) 901, 903 (C. C. A. 3); *United States* v. *Rayburn*, 91 F. (2d) 162, 164 (C. C. A. 8); *Fidelity & Casualty Co. of New York* v. *Darby*, 81 F. (2d) 229 (C. C. A. 3); *Emlenton Refining Co.* v. *Chambers*, 14 F. (2d) 104, 105 (C. C. A. 3), certiorari denied, 273 U. S. 731; cf. *Sumi* v. *Young*, 300 U. S. 251, 252.

[13] 28 U. S. C. 225.

(Note 11 continued:)

Swartz, 156 U. S. 272 (negroes barred from jury); *In re Belt*, 159 U. S. 95 (jury trial); *Matter of Moran*, 203 U. S. 96 (self-incrimination); *United States* v. *Valante*, 264 U. S. 563 (jury trial). Compare *Riddle* v. *Dyche*, 262 U. S. 333. Our second reason is that, the unavoidable question of jurisdiction aside, a decision by this Court would be so desirable to prevent confusion in the administration of the federal criminal law (see Petition for Certiorari, pp. 7–13) that we do not feel warranted in contending that issuance of the writ was an abuse of discretion.

We believe it appropriate to point out, however, that analysis of the decisions of this Court makes doubtful the propriety of *habeas corpus* at this stage in the proceedings against respondent. "The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released, by alleging want of jurisdiction and petitioning for a *habeas corpus*." *Ex parte Simon*, 208 U. S. 144, 147. See also *In re Chapman*, 156 U. S. 211; *Riggins* v. *United States*, 199 U. S. 548; *In re Lincoln*, 202 U. S. 178; *Johnson* v. *Hoy*, 227 U. S. 245. Cf. *In re Frederich*, 149 U. S. 70; *Tinsley* v. *Anderson*, 171 U. S. 101; *Markuson* v. *Boucher*, 175 U. S.

which provides that "the circuit courts of appeals shall have appellate jurisdiction *to review by appeal* " final decisions" of the district courts. Thus, they have no general supervisory or appellate jurisdiction over the district courts, except in bankruptcy, an exception which emphasizes the withholding of general supervisory powers in other cases.[15] Consequently when Section 262 empow-

[14] Italics added.

[15] "The appellate jurisdiction appears to be limited to two methods of review—by appeal and writ of error". *In re Pacquet*, 114 Fed. 437 (C. C. A. 5). See also *Travis County v. King Iron Bridge & Mfg. Co.*, 92 Fed. 690 (C. C. A. 5); *United States v. Moy Yee Tai*, 109 Fed. 1 (C. C. A. 2). But cf. *Grable v. Killits*, 282 Fed. 185 (C. C. A. 6), certiorari denied, 260 U. S. 735.

(Note 11 continued:)

184; *Urquhart v. Brown*, 205 U. S. 179. Also, the opinion at the last term in *Waley v. Johnston*, 316 U. S. 101, suggests that *habeas corpus* should be reserved for cases in which appeal was not an adequate remedy; the Court said: "The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. *In such circumstances* the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to enter it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." [Italics added.]

If the above statement from *Waley v. Johnston* sets forth the full extent to which the writ of *habeas corpus* is available to raise constitutional rights, then the writ would seem to have been improperly issued in this case. The rule quoted

ered the federal courts to issue those writs not specifically provided for by statute "which may be necessary for the exercise of their respective jurisdictions" it must have been intended that the circuit courts of appeals should issue only the writs necessary "to review by appeal." By the very words of Sections 128 and 262, therefore, extraordinary writs may issue only when they are in truth auxiliary to appeals, or in aid of appeals, and not

---

(Note 11 continued:)

above *Ex parte Simon*, *supra*, also might be invoked in the instant case, even if there were power to grant the writ. An appeal was pending. The record on appeal would show the bare facts relied upon to void the conviction—that respondent was not represented by counsel when he waived a jury trial. Respondent's difficulties in preparing a bill of exceptions might delay a decision on appeal and there is authority that delay is grounds for making an exception to the general rule. *In re Bonner*, 151 U. S. 242. But that decision appears to be contrary to the cases previously cited and to rest upon the circumstance that the sentence was a short one. Another fact, which the court below thought was exceptional, was that respondent might not be able to prepare a bill of exceptions adequate to show all the errors at the trial. It is certain, however, that a bill could be prepared to raise the question here presented on the merits. If the point were good, the inadequacies of the bill of exceptions in other respects would be immaterial. If the point is bad, respondent will be compelled, notwithstanding the issuance of the writ, to prepare the best bill he can. The writ of *habeas corpus*, therefore, did no more than save respondent the trouble of preparing his bill of exceptions. And, since every appellant is put to that task, the only exceptional circumstance in respondent's case (and it does not appear in the pleadings) is that the stenographic transcript has not been typed out because he lacked money to buy it. It may be

where it is sought to use them in lieu of the ordinary appellate processes.[18]

This apparent meaning of Sections 128 and 262 is confirmed by the contrast between the statutory provisions governing the circuit courts of appeals and the statutory provisions applicable to this Court. Both exercise only appellate jurisdiction

---

[18] Illustrations of the jurisdiction conferred by Section 262 to issue writs in aid of and auxiliary to appeals are contained in the following cases:

Mandamus: McClellan v. Carland, 217 U. S. 268 (to compel district court to proceed to a decision; *Ex parte United States*, 287 U. S. 241 (to compel issuance of a bench warrant); *United States* v. *Malmin*, 272 Fed. 785 (C. C. A. 3) (to compel judge to take office and perform duties); *In re Watts*, 214 Fed. 80 (C. C. A. 2) (to compel entry of final judgment); *Application of Sorini*, 4 F. (2d) 802 (C. C. A. 9) (to compel allowance of writ of error); *Muma* v. *Bodine*, 16 F. (2d) 463 (C. C. A. 3) (to compel allowance of appeal); *Petition of Zeno*, 14 F. (2d) 418 (C. C. A. 1), certiorari denied, 273 U. S. 737 (to compel intermediate appellate court to hear appeal); *In re Beckwith*, 203 Fed. 45 (C. C. A. 7), certiorari denied, 227 U. S. 678 (to compel observance of decree).

Prohibition: United States v. *Mayer*, 235 U. S. 55 (to prevent district court from vacating a decree from which appeal is pending); *Ex parte Equitable Trust Co.*, 231 Fed. 571 (C. C. A. 9) (to prevent allowance of intervention which would delay the principal suit).

Certiorari: The Margaret B. Roper, 106 Fed. 740 (C. C. A. 4) (to compel inclusion of certain documents in record on appeal).

Habeas Corpus: See *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2). Compare pp. 12–13, *supra*.

(Note 11 continued:)
doubted whether the additional trouble which respondent faced would justify departure from the general rule above stated. See also pp. 33–35, *infra*.

except in rare cases.[17] Both have power under Section 262 to issue all writs necessary to the exercise of their respective jurisdictions. But this Court, and not the circuit courts of appeals, has been authorized in express and specific terms to issue writs of prohibition to district courts in admiralty,[18] *mandamus* to all federal courts,[19] and *habeas corpus*.[20] This Court has frequently exercised the power to review void convictions upon *habeas corpus*, in cases which could not otherwise come before it, thus substituting review upon an original writ for review upon appeal or writ of error.[21] If Section 262, which is derived from Section 14 of the Judiciary Act of 1789, had

---

[17] U. S. Const., Art. III, Sec. 2. *United States* v. *Mayer*, 235 U. S. 55.

[18] Judicial Code, Sec. 234, 28 U. S. C. 342.

[19] *Ibid.*

[20] R. S. 751, 28 U. S. C. 451: "The Supreme Court and the district courts shall have power to issue writs of habeas corpus.". See also R. S. 752, 28 U. S. C. 452.

[21] E. g. *Ex parte Watkins*, 3 Pet. 191; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Siebold*, 100 U. S. 371; *In re Belt*, 159 U. S. 95.

In such cases the Court exercised appellate jurisdiction by the original writ because it reviewed the action of an inferior court. The appellate jurisdiction is not limited by the Constitution to appeals and writs of error but may be exercised by any form of process permitted by statute. *Ex parte Yerger*, 8 Wall. 85; *Ex parte Virginia*, 100 U. S. 339, 341. But the Court cannot issue the writ of *habeas corpus*, unless the detention is pursuant to order of an inferior court, except in cases within the original jurisdiction defined by Article III, Sec. 2. *Ex parte Watkins*, 3 Pet. 191; *Ex parte Hung Hang*, 108 U. S. 552.

carried the power to make such substitutions in the interests of more efficient review, then the express provisions would have been supererogatory. Conversely, if Congress had desired the circuit courts of appeals to review upon prohibition, *mandamus*, or *habeas corpus* where an appeal was inadequate, it would have followed the same course as it did in respect to this Court and would have granted the circuit courts of appeals the express power to issue writs of prohibition, *mandamus*, and *habeas corpus* instead of limiting them to "review by appeal" and to the use of writs necessary to the exercise of that jurisdiction.

For the most part the courts have construed Section 262 in accordance with its words, holding that original writs would issue thereunder only in aid of ordinary appellate processes and not as an alternative mode of exercising a general supervisory jurisdiction. In *Whitney* v. *Dick*, 202 U. S. 132, this Court held that the circuit courts of appeals were not authorized to issue original and independent writs of *habeas corpus*.[22] Section 262 (then R. S. 716) was pressed upon the Court and an argument made, which several circuit courts of appeals had adopted, that the circuit courts of appeals under that section could issue all the writs issued by this Court in the

[22] *Whitney* v. *Dick*, *supra*, also involved a question whether certiorari would issue out of a circuit court of appeals. As to that branch of *Whitney* v. *Dick*, see p. 29, *infra*.

exercise of its appellate jurisdiction. See *In re Buskirk*, 72 Fed. 14, 22 (C. C. A. 4); *Ex parte Moran*, 144 Fed. 594 (C. C. A. 8). The argument was rejected (202 U. S. at 136):

> * * * Cases may arise in which the writ of *habeas corpus* is necessary to the complete exercise of the appellate jurisdiction vested in the Circuit Court of Appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist, for the writ asked for here was an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court. There was no proceeding of an appellate character pending in the Court of Appeals for the complete exercise of jurisdiction in which any auxiliary writ of *habeas corpus* was necessary. * * *[22]

Thus, *habeas corpus* will issue from the circuit court of appeals only when it is auxiliary to other proceedings. An exigency making its use appropriate might arise if a convicted defendant were held *incommunicado* pending appeal or if a warden refused to free him upon reversal of the conviction, for the writ would aid the appellate process by making consultation with counsel possible in preparation of the appeal in the one case

[22] But it seems that an appeal might have been taken, as here, to the same circuit court of appeals as that in which *habeas corpus* was sought.

and by giving effect to the appellate decree in the other. But *habeas corpus* will not issue where it is not auxiliary to review by appeal but is in fact, as here, an independent proceeding substituted for an appeal as a challenge to the judgment.

This interpretation of *Whitney* v. *Dick* (which accords with the plain words of Sections 128 and 262) was expressly adopted by the court below in *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2),[24] and from the time of *Whitney* v. *Dick* until the present case, circuit courts of appeals had uniformly denied all applications for a writ of *habeas corpus ad subjiciendum*. E. g., *In re Anderson*, 117 F. (2d) 939, 940 (C. C. A. 9); *DeMaurez* v. *Swope*, 110 F. (2d) 564, 565 (C. C. A. 9); *Ferguson* v. *Swope*, 109 F. (2d) 152 (C. C. A. 9); *Smith* v. *Johnston*, 109 F. (2d) 152, 156 (C. C. A. 9); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10). See also *Ex parte Lamar*, 274 Fed. 160, 162 (before a single circuit judge), affirmed, 260 U. S. 711; *Ex parte Craig*, 282 Fed. 138, 143–144 (C. C. A. 2), affirmed 263 U. S. 255.

[24] "Reference to analogous legislation in respect to the writ of habeas corpus confirms the foregoing views. Section 751, U. S. Rev. Stat., confers the right to issue the writ *ad subjiciendum* upon the Supreme Court and the District Courts. But the Circuit Court of Appeals, having only appellate jurisdiction, is without power to grant the writ in this form (*Whitney* v. *Dick*, 202 U. S. 132), though it may in other forms, as *ad testificandum* or *ad respondendum*, necessary to

This interpretation of *Whitney* v. *Dick* also accords with the majority of decisions interpreting Section 262 as applied to civil cases. Whenever this Court has held that Section 262 authorized a circuit court of appeals to issue an extraordinary writ, it has been careful to point out just how the jurisdiction to review by appeal was aided. See *McClellan* v. *Carland*, 217 U. S. 268, 279, 280 (*mandamus*); *United States* v. *Mayer*, 235 U. S. 55 (prohibition); *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1 (*mandamus*). The circuit courts of appeals quite generally have held that they "have no power to issue the writ by virtue of the fact alone that they have appellate jurisdiction to review judgments and decrees of the District Courts, but that the exercise of that jurisdiction rests upon the fact that the issuance thereof is *auxiliary to and is necessary for the protection of*

---

the exercise of its appellate jurisdiction." 255 Fed. 24, 27 (C. C. A. 2).

A similar view was expressed by Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 98-99. Section 14 of the Judiciary Act of 1789, 1 Stat. 81, gave power to the courts "to issue writs of *scire facias*, *habeas corpus*, and all other writs * * * *which may be necessary for the exercise of their respective jurisdictions* * * *." It was held that the italicized clause did not limit the Court in issuing *habeas corpus* to the issuance of auxiliary writs because that clause modified only the words "all other writs". In the course of the opinion it was said that the opposing construction would limit the use of the writ chiefly to *habeas corpus ad testificandum*.

the jurisdiction of the appellate court which issues the same" (*Hammond Lumber Company* v. *United States District Court*, 240 Fed. 924, 927–928 (C. C. A. 9)) (italics added). Accord: *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2); *In re Gilbough*, 13 F. (2d) 462 (C. C. A. 2) (but cf. *Ex parte Edelstein*, 30 F. (2d) 636 (C. C. A. 2), certiorari denied, 279 U. S. 851); *Dooley Improvements* v. *Nields*, 72 F. (2d) 638 (C. C. A. 3); *Raritan Copper Works* v. *Elliott*, 271 Fed. 284 (C. C. A. 3) (but cf. *In re Eastman Kodak Co.*, 48 F. (2d) 125 (C. C. A. 3)); *In re Pacquet*, 114 Fed. 437 (C. C. A. 5); *Travis County* v. *King Iron Bridge & Mfg. Co.*, 92 Fed. 690 (C. C. A. 5); *In re Eilers Music House*, 284 Fed. 815, 818 (C. C. A. 9), certiorari denied, 257 U. S. 646; *Shell Oil Co.* v. *District Court*, 70 F. (2d) 394 (C. C. A. 9); *Keaton* v. *Kennamer*, 42 F. (2d) 814 (C. C. A. 10). Compare *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485 (C. C. A. 10).

As we indicated above (see p. 15, *supra*), there is also a contrary line of decisions expressing the view that such original writs as prohibition, *mandamus*, certiorari, and *habeas corpus* may issue from circuit courts of appeals under Section 262 "where the right of appeal exists, but because of the presence of 'circumstances imperatively demanding,' a departure from the ordinary remedy by * * * appeal is necessary." *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. (2d)

545 (C. C. A. 8). Accord: *In re Lisman*, 89 F. (2d) 898 (C. C. A. 2); *Grable* v. *Killits*, 282 Fed. 185 (C. C. A. 6), certiorari denied, 260 U. S. 735; *Greyerbiehl* v. *Hughes Electric Co.*, 294 Fed. 802 (C. C. A. 8), certiorari denied, 264 U. S. 589; *Whittel* v. *Roche*, 88 F. (2d) 366 (C. C. A. 9). These cases sprang from occasional statements by this Court to the effect that Section 262 affords to it ample opportunity for using the common law writ of certiorari, not only as auxiliary process, but also, whenever there is imperative necessity, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways. See e. g., *In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132;[25] *United States* v. *Beatty*, 232 U. S. 463.

But the statements relied upon apparently sprang from an error in reading the statute and, even on other authoritative decisions alone, must be rejected as erroneous interpretations of Section 262. The earliest statement is found in *In re Chetwood*, 165 U. S. 443. In that opinion Chief Justice Fuller referred to Section 262 (then R. S. 716) but quoted it erroneously as providing that the federal courts may "issue all writs, not specifically provided for

[25] *Whitney* v. *Dick*, *supra*, involved both *habeas corpus* and certiorari. It is noteworthy that the suggestion that there was a broad power in exceptional cases "imperatively demanding that form of interposition" was confined to the discussion of the writ of certiorari.

by statute, which may be agreeable to the usages and principles of law"; thus, he omitted the critical requirement that the writs be "necessary for the exercise of their [the courts'] respective jurisdictions" (p. 462). Then the opinion, without further discussion, states that "whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice." The statement was far broader than the case required. As was pointed out shortly after in *In re Tampa Suburban Railroad Company*, 168 U. S. 583, 587, the writ issued in the *Chetwood* case was truly auxiliary, for it brought up certain ancillary contempt orders which, by punishing an attorney for prosecuting a writ of error, interfered with the jurisdiction of this Court on the writ of error. See also *United States* v. *Dickinson*, 213 U. S. 92, 101. Moreover, the *dictum* was contrary to the previous decisions of the Court. Although at common law certiorari had been used, first, to reexamine the action of inferior tribunals and, second, to obtain information upon a matter before an appellate tribunal, it was early held unequivocally that in this Court certiorari could be used only for the second purpose. *United States* v. *Young*, 94 U. S. 258; *Ex parte Vallandigham*, 1 Wall. 243; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 380. See *United States* v. *Rauch*, 253 Fed. 814 (S. D. N. Y.) per Hough, C. J.

The weight gained by the *Chetwood dictum* through repetition is not enough to overbalance its dubious origin and unfaithfulness to the statutory language. The entire *dictum*, including the erroneous quotation of the statute, was quoted in *Whitney* v. *Dick*, 202 U. S. 132, 139, to show that Section 262 at the most would sanction certiorari only in extraordinary cases, and it was restated in substantially the same words in *United States* v. *Beatty*, 232 U. S. 463, 467, although the writ was not issued. See also *McClellan* v. *Carland*, 217 U. S. 268, 278–279; *In re 620 Church St. Corp.*, 299 U. S. 24, 26.[26] But the only instances in which this Court has actually issued certiorari under Section 262, as an independent and not as an auxiliary writ, have been cases which were already improperly before the Court on appeal or certiorari under Section 240 of the Judicial Code. *McClellan* v. *Carland*, 217 U. S. 268; *Meeker* v. *Lehigh Valley R. R. Co.*, 234 U. S. 749; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison, T. & S. F. Ry.*, 253 U. S. 117.[27] And even this use of certiorari ap-

[26] The statement was also cited with approval in *Turner* v. *United States*, 14 F. (2d) 360, 361 (C. C. A. 8); *Greyerbiehl* v. *Hughes Electric Co.*, 294 Fed. 802, 805–806 (C. C. A. 8); *Minnesota & Ontario Paper Co.* v. *Molypeaux*, 70 F. (2d) 545, 546 (C. C. A. 8); *Blake* v. *District Court*, 59 F. (2d) 78, 79 (C. C. A. 9).

[27] *In re 620 Church St. Corp.*, 299 U. S. 24, and *Holiday* v. *Johnston*, 313 U. S. 342, are instances in which certiorari was issued under Section 262 to bring up cases which could not otherwise come before the Court because leave to appeal had

parently was much affected by the analogy to the statutory writ by which this Court reviews the judgments and decrees of the circuit courts of appeals (compare *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 385; *Forsyth* v. *Hammond*, 166 U. S. 506, 513; *United States* v. *Gulf Ref. Co.*, 268 U. S. 542, 545) so that it may be doubted whether the writ could have been used for such purposes had Section 262 stood alone. See *United States* v. *Dickinson*, 213 U. S. 92. We submit, therefore, that the *Chetwood* dictum and the decisions following it cannot be regarded as controlling interpretations of Section 262 as regards the powers of the circuit courts of appeals, but must be set aside as aberrations from the true interpretation adopted in the line of decisions discussed first above.[23]

---

been denied by the circuit court of appeals. The denial of leave to appeal prevented the Court from exercising its normal appellate authority and therefore certiorari would issue to remove the obstruction and make possible the exercise of the appellate jurisdiction. A close analogy is the use of *mandamus* to compel a district court to proceed in the case before it. See e. g., *McClellan* v. *Carland*, 217 U. S. 268.

[23] The above-cited decisions of this Court in which common-law certiorari was issued, as an independent writ in lieu of ordinary appellate processes, have no present significance, for Section 240 as amended by the Act of February 13, 1925, now permits the Court to bring before it any case in a circuit court of appeals.

The cases in which this Court has issued writs of prohibition do not support either interpretation. As Mr. Justice Van Devanter pointed out in *Ex parte Bakelite Corp.*, 279 U. S. 438, "The power of this Court to issue writs of

Broader considerations than either the words of Section 262 or the applicable precedents also support the view that writs issued by the circuit courts of appeals under Section 262 must be auxiliary to review by appeal. The familiar policies which deny review at interlocutory stages [29] and cause the courts to refuse to issue *mandamus*,[30] prohibition,[31] and particularly *habeas corpus*,[32] when other remedies are available, call for a strict interpretation of Section 262. Such an interpretation leaves ample play in the judicial system to care for extravagant and unforeseeable cases. This Court

---

prohibition never has been clearly defined by statute or by decisions." Compare *Ex parte Joins*, 191 U. S. 93, 102. Section 234 of the Judicial Code, 28 U. S. C. 342, gives express power to issue the writ only when it is directed to courts of admiralty and at one time it seemed settled that the writ could be issued only in the admiralty cases specifically covered by statute. *Ex parte Christy*, 3 How. 292, 322; *Ex parte Graham*, 10 Wall. 541. The Court has, however, frequently issued prohibition to other courts. E. g., *In re Rice*, 155 U. S. 396; *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte United States*, 226 U. S. 420; *In re Labor Board*, 304 U. S. 486. The statutory basis for issuance of the writ in these cases was not made clear, but they may be explained on the ground that *mandamus* will also correct excesses of jurisdiction (see *Ex parte Oklahoma*, 220 U. S. 191, 209) so that the substance of both writs is covered by the express authority to issue writs of *mandamus* granted by Section 234.

[29] See *Cobbledick v. United States*, 309 U. S. 323, 324–326.

[30] *Ex parte Perry*, 102 U. S. 183; *Ex parte Nebraska*, 209 U. S. 436; *Ex parte American Steel Barrel Co.*, 230 U. S. 35.

[31] *In re Huguley Mfg. Co.*, 184 U. S. 297; *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte Riddle*, 255 U. S. 450.

[32] See p. 16, n. 11, *supra*.

has wide powers to issue *mandamus*, prohibition, and *habeas corpus* under express statutory provisions. (See p. 21, *supra*.) The result of denying the power to the circuit courts of appeals would be to focus in one appellate court the power to grant extraordinary remedies departing from the normal judicial processes.[33] At the same time, Section 262 would retain under our interpretation ample scope to permit the circuit courts of appeal to check interferences with their appellate jurisdiction.[34]

This interpretation works no injustice as applied specifically to writs of *habeas corpus*. Appeals are not always adequate to remedy cases of unlawful detention pursuant to court order; for that reason Congress expressly confided power to issue such writs to this Court, and to the district courts with a right of appeal to the circuit court of appeals. Adequate provision for the protection of personal liberty having thus been made, there is no constraint to enlarge the powers of the circuit courts of appeals. Cf. *Whitney* v. *Dick*, *supra*, 135. The latter courts have no convenient facilities for conducting hearings and making findings of fact in accordance with statute (*Walker* v. *Johnston*, 312 U. S. 275; *Holiday* v. *Johnston*, 313 U. S. 342); yet the cases most ap-

[33] The paucity of cases arising in this Court under Section 234 of the Judicial Code and Section 751 of the Revised Statutes indicates that there would be no burdensome increase in the cases coming before this Court.

[34] See p. 20, n. 16, *supra*.

propriate for *habeas corpus* are those in which the facts relied upon are dehors the record. See *Waley* v. *Johnston*, 316 U. S. 101. It would scarcely be suggested that in the present case the circuit court of appeals could properly have issued the writ if no appeal had been taken or if the time for perfecting the appeal had expired. The case stands upon no different footing because technically an appeal was pending. Respondent's remedy was to perfect his appeal or (assuming the case at this stage to call for the writ) to apply to the district court, or perhaps to this Court, for *habeas corpus;* [35] but not to the circuit court of appeals.

B. *Even if the circuit courts of appeals have the necessary power in extraordinary cases, the court below lacked power in this case to issue a writ of habeas corpus*

Respondent's case would stand no better if we were to assume that Section 262 authorized a circuit court of appeals to review a conviction by writ of *habeas corpus* whenever circumstances "imperatively demand" a departure from the normal process of review by appeal. In his petition respondent did not plead any unusual cir-

[35] Ordinarily applications for *habeas corpus* must be made to the district court, *Ex parte Mirzan*, 119 U. S. 584, but where, as here, the order of commitment was entered by the very court to which application would have to be made, this Court has accepted the petition. *In re Sawyer*, 124 U. S. 200; *Ex parte Terry*, 128 U. S. 289, 301–302.

cumstances and the return refers to none. No evidence appears to have been offered. Consequently, on the record made, it seems plain that *habeas corpus* was used as a substitute for an appeal simply because it would make preparation of a bill of exceptions unnecessary. It is settled that such a showing does not avoid the general rule (*Whitney* v. *Dick*, 202 U. S. 132, 140–141) and it follows, therefore, that the court below was without jurisdiction to entertain the petition.

The same result obtains even if we go outside the record in search of extraordinary circumstances. The court below found such circumstances in the respondent's unusual difficulty in preparing his bill of exceptions. But the writ did not improve the respondent's position in this respect. As the court below stated, he could have prepared a sufficient bill to present the question whether he was lawfully tried without a jury (R. 9). If the conviction was held unlawful on this ground, either in *habeas corpus* or on appeal, any other errors committed during the course of the trial would be immaterial and the inadequacy of the bill of exceptions to present those errors would be unimportant. If the point is bad, the respondent is forced back on his bill of exceptions regardless of whether the decision comes in *habeas corpus* or on appeal. The only consequence, therefore, of entertaining the writ of *habeas corpus* was to enable the respondent to bring up one point in advance without the neces-

sity of preparing the best bill of exceptions which the circumstances permitted. The advantages of such a course to respondent are obvious but they are not peculiar to the present case; on the contrary, to appeal their points one at a time would aid many defeated litigants. Respondent's case differs only in that he has no stenographic transcript so that, apparently, preparation of the bill of exceptions is taking an unusually long time. But although this might be a factor on an application for bail, it is not a circumstance "imperatively demanding" a departure from the course specified by Congress.

II

A DEFENDANT WHO IS AWARE OF HIS RIGHTS AND CAPABLE OF MAKING AN INTELLIGENT CHOICE MAY BE PERMITTED TO WAIVE A TRIAL BY JURY WITHOUT THE ADVICE OR ASSISTANCE OF COUNSEL

Even if it be held that the court below, in the circumstances of this case, had the power to entertain the petition for a writ of *habeas corpus*, the issuance of the writ was not warranted by the merits of the petition.

This branch of the case presents the bare question whether a trial court may in a felony case ever accept a waiver of a jury trial from a defendant who has deliberately refused to be represented by counsel. The course of the pleadings in the court below shows the purpose to eliminate all factual questions and to present this question, as the court below said, "in the barest possible form" (R. 10).

Respondent withdrew his original petition which had alleged that he was not advised of his right to counsel and that the trial court had accepted the waiver of jury trial perfunctorily (Appendix D, *infra*, pp. 63–67). The present petition alleges simply that respondent did not have the assistance of counsel at any stage of the proceedings and that upon his own motion he was tried without a jury (R. 2). The marshal's return was not traversed. The court below accepted as accurate the facts set forth in the return (R. 9–10).[36] In view of this course of the proceedings it cannot now be questioned that in waiving counsel, and subsequently in waiving trial by jury, respondent made a deliberate choice.[37] Although advised by the court to obtain counsel, he twice insisted that he was better able to represent himself than an attorney could (R. 4–5). Respondent was no helpless stranger to the law and the courts; he had studied law sufficiently, in his own opinion, "adequately to defend himself" (R. 5) and indeed he had represented himself in extensive civil litigation (R. 5–6). At the trial, it was respondent himself who, although advised of his constitutional rights, moved to have the case tried by the judge without a jury (R. 2, 5, 7).

[36] Cf. *Walker* v. *Johnston*, 312 U. S. 275, 284.

[37] In his brief filed in this Court at the last term prior to the appointment of counsel, respondent sought to argue the questions of fact raised by his first petition for *habeas corpus*.

Neither the Constitution nor any rule of law requires that respondent be permitted a new trial in the hope of escaping the consequences of the procedure which he knowingly initiated and upon which he knowingly insisted. An accused who is represented by counsel may waive a trial by jury with the approval of the court. And it has been consistently held that an accused may waive his right to the assistance of counsel and conduct his own defense. There is no reason why these two waivers may not, in appropriate situations, be exercised in the same case. An accused who is conducting his own case has, and should have, we submit, the same powers to insist upon or waive constitutional rights, including the right to trial by jury, as defendants represented by counsel.

1. In *Patton* v. *United States*, 281 U. S. 276, this Court resolved the doubts previously existing [28] concerning whether a defendant in a criminal case could waive the right to trial by jury guaranteed by Article III, Section 2, and the Sixth Amendment of the Constitution. The precise issue in the *Patton* case was whether the accused could waive a trial by twelve jurors and be tried by eleven. The United States urged that the Constitution did not preclude an express waiver of the entire jury (Br. for the United States, No. 53, October Term, 1929, pp. 7–47),

[28] E. g., *Thompson* v. *Utah*, 170 U. S. 343, 353; *Low* v. *United States*, 169 Fed. 86, 91 (C. C. A. 6).

and this Court held that it was logically required to decide the issue as thus broadly posed (pp. 290–293). After exhaustive analysis, the Court concluded that the right to a trial by jury guaranteed by the Constitution could be waived. The Court pointed out, however, that the power of a defendant to waive his right to a jury trial did not include power to insist upon trial to the court, and that, after the waiver was made, the trial court should determine the manner of trial in the exercise of an informed discretion.

Despite the intimations of the court below (R. 10–11) we assume that the Court will not in this case wish to reexamine the broad conclusion of the *Patton* case. The right of an accused to waive his right to trial by jury, provided there is compliance with the safeguards prescribed in the *Patton* case, is now woven into the fabric of our criminal procedure. The practice of trying criminal cases to the court was specifically called to attention of Congress when it amended the Criminal Rules Act in 1934 and Congress impliedly approved the practice.[39] The Criminal Rules rec-

[39] The Act of February 24, 1933, c. 119, 47 Stat. 904, provided that the Court should have power to prescribe rules of practice and procedure with respect to proceedings after verdict but made no mention of jury-waived cases. The Department of Justice feared that some question might arise as to whether the rules prescribed would cover jury-waived cases and requested that the statute be amended so that the rules would surely cover both jury and jury-waived cases. See S. Rep. 257, 73rd Cong., 2d Sess.; H. Rep. 858, 73rd Cong., 2d Sess. Accordingly by Act of March 8, 1934, c. 49, 48 Stat.

ognize that juries may be waived. See Rules and Forms in Criminal Cases, 292 U. S. 659, 669, 670. The inferior courts have repeatedly held that in appropriate circumstances waiver is permissible. *Ferracane* v. *United States*, 47 F. (2d) 677, 679 (C. C. A. 7); *Jabczynski* v. *United States*, 53 F. (2d) 1014, 1015 (C. C. A. 7); *Brouse* v. *United States*, 68 F. (2d) 294 (C. C. A. 1); *Irvin* v. *Zerbst*, 97 F. (2d) 257, 258 (C. C. A. 5); *Spann* v. *Zerbst*, 99 F. (2d) 336 (C. C. A. 5); *Brown* v. *Zerbst*, 99 F. (2d) 745, 746 (C. C. A. 5); *United States* v. *Brunett*, 53 F. (2d) 219, 226 (W. D. Mo.); cf. *United States* v. *Streul*, 99 F. (2d) 474, 478 (C. C. A. 2); *Hagner* v. *United States*, 54 F. (2d) 446, 448 (App. D. C.), affirmed, 285 U. S. 427. Commentators have almost unanimously approved the *Patton* case, both as a matter of law and as a matter of policy.[39]

Even if the question were one of first impression, it would seem clear that the Constitution does not

---

399, the statute was amended to provide that the Court might prescribe rules with respect to "proceedings after verdict, or finding of guilt by the court if a jury has been waived, or a plea of guilty". See also Act of June 29, 1940, c. 445, 54 Stat. 688.

This legislation is a complete answer to any argument that, even though an accused may waive his constitutional right, legislative sanction is required before the courts may try the accused without a jury.

[39] E. g., Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695 (1927); Bond, *The Maryland Practice of Trying Criminal Cases by Judge Alone, Without Juries*, 11 A. B. A. Journal 699 (1925); Grant, *Felony Trials Without a Jury*, 25 Am. Pol. Sci. Rev. 980 (1931).

prohibit acceptance of a waiver of jury trial." The language of Article III, Section 2, of the Constitution, providing that "The Trial of All Crimes, except in Cases of Impeachment, shall be by Jury; * * *" should be interpreted in the light of the Sixth Amendment, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." Read together these provisions create not a mandatory requirement of a trial by jury to be imposed against the will of a defendant, but a right to such a trial, to be enjoyed or waived by the intelligent choice of the accused. Cf. *Schick* v. *United States*, 195 U. S. 65, 71–72, *Belt* v. *United States*, 4 App. D. C. 25, 35–36; Cf. also *Guild* v. *Frontin*, 18 How. 135; *Campbell* v. *Boyreau*, 21 How. 223.

The historical background of the constitutional provisions supports the view, if support now be needed, that their purpose was to create a right and not to impose a requirement. The guaranties of jury trial were intended for the benefit of the accused; there is nothing to indicate an intention of the framers to impose trial by jury on the accused against his will in all cases. See Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1934). And indeed, there is considerable evidence to show

---

"The argument that some statute or public policy forbids acceptance of the waiver is now foreclosed. See p. 38, n. 39, *supra*.

that waiver of trial by jury with a resulting trial by the court were fairly frequent practice in colonial times and when the Constitution was adopted. Grinnell, *To What Extent is the Right to Jury Trial Optional in Criminal Cases in Massachusetts?* 8 Mass. Law Quarterly, No. 5, pp. 7, 15–38 (1923); Bond, *op. cit. supra* at pp. 699–701; Griswold, *op. cit. supra* at pp. 657–669; *Commonwealth* v. *Rowe*, 257 Mass. 172. In these circumstances, recognition of the right of waiver in cases where the defendant deemed it to his interest to exercise that right could not have been regarded by the framers of the Constitution as inconsistent with the institution of trial by jury.

The right may be waived by those for whose benefit it is intended. Other rights conferred by the Fifth, Sixth, and Seventh Amendments have generally been held to be susceptible of waiver. (See pp. 43–44 *infra*.) There is no reason why this right should be regarded as standing upon any different footing, for, contrary to the suggestion of the court below (R. 10–11), this Court has clearly indicated that the right to trial by jury is no more fundamental in the administration of the criminal law than other rights guaranteed by the Constitution. See *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Schick* v. *United States*, *supra*; cf. *In re Bolt*, 159 U. S. 95, 99.[42]

[42] In *Palko* v. *Connecticut*, *supra*, this Court stated that the right to trial by jury is not "so rooted in the traditions and

2. It is established that an accused may waive the assistance of counsel, provided he does so intelligently and competently and not in ignorance of his constitutional rights. *Johnson* v. *Zerbst*, 304 U. S. 458, 465. In the instant case, the respondent, though urged several times to retain counsel, repeatedly refused and insisted that no attorney could give him as adequate representation "as he would be able to give himself" (R. 4–5, 9–10). There can, therefore, be no contention that respondent was deprived of any constitutional right by being permitted, at his own request, to act as his own attorney.

3. The court below concluded that although an accused may waive representation by counsel, if he does so he completely loses the privilege, which a defendant with counsel has, of waiving his right to a jury trial and asking the court to permit a trial without a jury. We submit that a person acting as his own counsel must have the same control over his case as one represented by counsel and that such a person may exercise the same privileges, including that of waiving a jury trial

---

conscience of our people as to be ranked as fundamental.' • • • Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" it. The Court further observed that the right to a jury trial does not rise to the same "plane of social and moral values" as the right to the assistance of counsel which is "implicit in the concept of ordered liberty" (pp. 325, 326). But cf. *Jacob* v. *New York City*, 315 U. S. 752.

with the consent of the court and the prosecuting attorney.

The Sixth Amendment gives to defendants the right "to have the assistance of counsel." It nowhere suggests that one who prefers to conduct his own defense shall have less power to waive constitutional rights than would his attorney. That the defendant is entitled to manage his own cause personally to the same extent as through an attorney appears from the language of the controlling provision of the Judiciary Act of 1789 (Sec. 35, 1 Stat. 73, 92), now contained in Section 272 of the Judicial Code (36 Stat. 1164, 28 U. S. C. 394). That section provides that—

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

This statute was adopted contemporaneously with the Sixth Amendment and must be regarded as consistent with it. Since it permits a party to manage his own cause personally *or* by the assistance of counsel, it clearly indicates that a party not represented by counsel has the same powers as one who is so represented.

This contemporary statutory indication is reenforced by consideration of the unfairness inherent in circumscribing by any rigid formula

the powers of an accused who is managing his own cause. A defendant with counsel may waive many of his constitutional rights if he deems it to his advantage to do so. He may waive the privilege against being twice placed in jeopardy;[43] he may take the witness stand and be cross-examined;[44] he may waive his right to a "speedy trial";[45] his right to be tried in "the state [and district] where the said crimes shall have been committed";[46] and his right "to be confronted with the witnesses against him."[47] Normally, these rights are an advantage to a defendant but there are circumstances in which it may be to his advantage to waive any one or more of them; for example, it is frequently of great importance that a defendant should take the witness stand and waive his privilege against self-incrimination. To deny to a defendant who has waived counsel the right to seek the advantages of any of these waivers whenever he deems it wise would be for the courts to deny him the right to manage his own case as effectively as a defendant who is represented by counsel. The Constitution impels no such result and the statute would seem to forbid it.

---

[43] *Trono* v. *United States*, 199 U. S. 521.

[44] *Fitzpatrick* v. *United States*, 178 U. S. 304, 315.

[45] *Pietch* v. *United States*, 110 F. (2d) 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648.

[46] *Haefner* v. *United States*, 54 F. (2d) 446, 447–449 (App. D. C.), affirmed, 285 U. S. 427.

[47] *Diaz* v. *United States*, 223 U. S. 442; *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4), certiorari denied, 268 U. S. 691.

Nor for present purposes can any valid distinction be drawn between the right of an accused to seek acceptance of his waiver of these other constitutional guarantees which are normally relied upon in criminal proceedings and his right, with the court's permission, to waive a jury trial. For just as there are, as we have noted, appropriate circumstances in which it may be to the advantage of the accused to waive his other rights, so unquestionably there are circumstances in which it may be to his advantage to dispense with his right to a jury trial, and ask to be tried by the court. Where there is accusation of a revolting or brutal offense, or of a crime where popular prejudice has outrun the law, or where a speedy trial is particularly imperative, or—as may likely have been the case here—where the defense is complicated and technical and the defendant believes he may be distrusted by a jury,[48] waiver of the right to a jury may be of large importance to an accused. Grant, *Felony Trials Without a Jury*, 25 Am. Pol. Sci. Rev. 980, 991–993 (1931); Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 713–715 (1927); Frank, *Trying Criminal Cases Without Juries in Maryland*, 17 Va. L. Rev. 253, 261–262 (1931); Perkins, *Proposed Jury Changes in Criminal Cases*, 16 Iowa L. Rev. 223,

[48] In this case this may well have been respondent's view since in a civil case involving the same or similar transactions the jury had decided against him. *McCann* v. *New York Stock Exchange*, 107 F. (2d) 908 (C. C. A. 2).

224–225 (1931). Thus, it has been concluded that "there are cases where it is a positive injustice to deny the defendant the right to waive a jury, where the right to refuse to be 'tried by one's country' is as valuable a right as that to trial by jury". Grant, *op. cit. supra,* at p. 994. See also Oppenheim, *op. cit. supra,* at p. 696.[49] If this be so, and we believe that it is, a defendant should not be deprived of a choice which otherwise is his, simply because he exercises his right to dispense with an attorney.

Nor is a defendant acting without counsel so incapable of making an intelligent decision on the question of waiver of his right to a jury trial as to justify withholding from him all power of choice. Initially it should be noted that there is nothing in the record of this case to indicate that the absence of counsel and of jury resulted in any injustice or, indeed, any mistake in strategy which might have been avoided had there been a jury; nor has respondent suggested that the course of the trial would have been different if he had been tried by a jury or if he had been advised by counsel whether to waive his right. But the decision below seems to assume that, because some defendants

[49] In fact it has been pointed out that a Connecticut statute permitting waiver of trial by jury, enacted in 1874, was repealed in 1878 upon the argument that it was designed to aid criminals. Maltbie, *Criminal Trials Without a Jury in Connecticut*, 17 J. of Crim. Law 335, 338 (1926).

might act more wisely in determining whether to waive their right to a jury trial if represented by counsel, all should be forbidden to do so at all without legal advice. The same reasoning would apply to almost any decision which a defendant is called upon to make during the course of a trial. Questions concerning the advisability of making various available motions concerning the admissibility and presentation of evidence, and concerning the waiver of other privileges, all present problems calling for more technical legal knowledge than the essentially practical judgment concerning whether a defendant is likely to fare better at the hands of a judge than at the hands of twelve lay jurors. And errors in such technical matters are likely to be at least as prejudicial to a defendant as the choice of one impartial fact-finding body over another. Indeed, to hold that a conviction must be set aside if a defendant exercises his own judgment concerning any matter with respect to which a lawyer may have superior knowledge would mean, in effect, that a defendant could do nothing without legal assistance and would thus effectively destroy his statutory right to handle his own case in his own way without the intervention of counsel. If defendants are to be allowed to plead and manage their own causes, they must be permitted to make their own decisions, whether or not consultation with an attorney might have led to the choice of a different course.

The majority of the court below, however, while stating that as an original matter it might not have treated as a critical circumstance the absence of counsel in waiver of jury trial, expressed its view that the decisons of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, and *Glasser* v. *United States*, 315 U. S. 60, compelled the conclusion that a defendant appearing *pro se* cannot waive his right to a jury trial. But while both cases show plainly that full effect will be given to the constitutional guarantee of the right to have the effective assistance of counsel, and while both insist upon a careful judicial scrutiny of a purported waiver of such assistance, neither reaches the issue involved in the instant case and neither is decisive of it. The *Johnson* case holds only that the Sixth Amendment protects defendants against trial without counsel where they have been inadequately apprised of their constitutional rights and that it must clearly appear that a defendant has in fact been informed of his rights so that he can make an informed choice concerning their waiver. Similarly, the *Glasser* case holds that a clear showing is necessary before a defendant will be deemed voluntarily to have waived his right to the effective assistance of counsel. The record is plain in the instant case (*supra*, pp. 35–36), that these several requirements of a true waiver have been fulfilled.

While we have been unable to find any cases determining the precise issue involved in this

case,[50] we submit that a persuasive analogy in support of our position is the power of a defendant to plead guilty and thus waive his right to a trial altogether, without the assistance of counsel. So long as a defendant is sufficiently apprised of his constitutional rights, a conviction based upon a plea of guilty made without the benefit of advice of counsel will not be set aside. *Williams* v. *Sanford*, 110 F. (2d) 526 (C. C. A. 5), certiorari denied, 310 U. S. 643; *Harpin* v. *Johnston*, 109 F (2d) 434 (C. C. A. 9), certiorari denied, 310 U. S. 624; *Moore* v. *Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10), certiorari denied, 310 U. S. 643; *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10), certiorari denied, 308 U. S. 553; *Cundiff* v. *Nichol-*

---

[50] In *Dillingham* v. *United States*, 76 F. (2d) 36, the Circuit Court of Appeals for the Fifth Circuit indicated that if a defendant understood his rights, he could waive trial by jury even though he was without the assistance of counsel. Although the court held that the defendant in that case had been deprived of constitutional rights, it stated (p. 39):

"When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, particularly if the waiver has been given, without advice of counsel of his own selection, the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights. * * *"

In at least two states, waiver of a jury trial by a defendant without counsel has expressly been held to be permissible. *Berry* v. *State*, 61 Ga. App. 315, 6 S. E. (2d) 148 (1939); *People* v. *Thompson*, 41 Cal. App. (2d) Sup. 965, 108 P. (2d) 105 (1940).

son, 107 F. (2d) 162 (C. C. A. 4); *Franzeen* v. *Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9); *McCoy* v. *Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10); *Wilson* v. *Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10); *Pers* v. *Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9); *Zeff* v. *Sanford*, 31 F. Supp. 736 (N. D. Ga.), affirmed, *Sanford* v. *Zeff*, 114 F. (2d) 1018 (C. C. A. 5); *Erwin* v. *Sanford*, 27 F. Supp. 892 (N. D. Ga.). And although this Court has never expressly ruled that a conviction based upon a plea of guilty made by a defendant without counsel will not *ipso facto* be set aside, a necessary implication of *Walker* v. *Johnston*, 312 U. S. 275, is that such a conviction is valid. For an issue in that case was whether the defendant who had pleaded guilty had voluntarily waived his right to assistance of counsel in making such plea (p. 286). Plainly if the defendant could not have pleaded guilty without counsel, the issue of voluntary waiver of the right to counsel would have been immaterial.

If, therefore, a defendant may plead guilty after having waived his right to counsel, and we believe it plain that he may, it seems clear that in appropriate circumstances a defendant who has waived counsel may also waive his right to a jury trial. For the

plea of guilty has, of course, much more serious consequence to a defendant than the waiver of jury trial. It has the effect of waiving not only the jury but the trial itself and any possible defenses which might have been raised. The plea of guilty "is tantamount to a waiver, not only of the right to counsel, but of the right to trial by a jury." *Cooke* v. *Swope,* 28 F. Supp. 492, 494 (W. D. Wash.), affirmed 109 F. (2d) 955 (C. C. A. 9). It would seem to follow, *a fortiori,* that if a defendant may lawfully plead guilty without advice of counsel he may waive the lesser right to a jury trial. Cf. *Patton* v. *United States,* 281 U. S. 276, 294–295, 304–305.

For these reasons, we think that a defendant has the power to waive his right to jury trial, and that his unwillingness to seek or accept legal advice in no way affects that power. A party has the inherent right to manage his cause in the manner he deems best, and the right should not be curtailed solely by reason of his desire to do without legal assistance. While it may be thought that a defendant who insists upon waiving both counsel and his right to trial by jury is not acting in his own interest, it cannot be said that the Constitution prohibits the waiver.

The remaining question is whether the trial court, acting under the duty enjoined upon it in the *Patton* case to determine whether to make

effective a defendant's waiver of his right to a jury trial, should always refuse trial to the court in the case of a defendant who has no counsel. We submit that no such general rule should be established. Under the *Patton* case the trial court has the power, of course, to determine the method of trial, equally in the case of a defendant with counsel and in the case of a defendant managing his own cause. In each case the trial court must satisfy itself that the defendant knows what his rights are, knows the implications of his choice, and is competent to make a choice at all. In addition, before the waiver is made effective, the trial court must determine that the interests of justice—the interests of the public and of the individual accused—will be served by departing from the normal course of trial by jury. Undoubtedly, the trial court will scrutinize the proposed waiver of a jury more searchingly where a defendant has no counsel than it will when an experienced member of the bar joins the district attorney in representing that a trial to the court is desirable. There may even be cases where a trial court may appropriately accept a waiver of jury trial from a defendant who has counsel, where it would reject such a waiver from a defendant who had chosen to conduct his own cause. But there is no requirement that the trial court must invariably refuse to make effective a waiver from a defendant without counsel; and in this case, there is no indication

whatever that the circumstances did not warrant the trial court's exercise of its discretion in accepting the waiver.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the court below should be set aside.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ARCHIBALD COX,
RICHARD S. SALANT,
Attorneys.

SEPTEMBER 1942.

APPENDIX A

Article III, Section 2; Clause 3, of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 272 of the Judicial Code (28 U. S. C. § 394).

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are

permitted to manage and conduct causes therein.

Section 262 of the Judicial Code (28 U. S. C. § 377), provides:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

28 U. S. C. §§ 451, 452, and 463 (a), relating to the power of courts to issue writs of habeas corpus, provide:

> SEC. 451. The Supreme Court and the district courts shall have power to issue writs of habeas corpus.
>
> SEC. 452. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> SEC. 463. (a) In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit

wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

APPENDIX B

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES, APPELLEE;

v.

GENE MCCANN, APPELLANT

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

PER CURIAM: The papers submitted by the appellant cannot be treated as an application for habeas corpus as there is no petition for a writ. We have, however, considered them as an application to reduce bail; as such we reduce the bail to $1,500. The appellant may, if he wishes, have a writ of habeas corpus issued out of this court upon a duly verified petition stating the circumstances by virtue of which he asserts he was improperly deprived of a trial by jury. The warden of the City Prison is requested to allow him access to a notary public to verify such a petition after it has been prepared presumably by the attorney who filed the brief now before us. That writ may be made returnable on March 16th, and a copy of the petition and any supporting brief should be in the hands of the district attorney on or before March 11th. However, it is only fair to remind the appellant that if he is released on bail, he will not be entitled to any writ of

habeas corpus; and that in that event he will have to wait until the appeal is heard to raise the question as to the deprivation of his right of trial by a jury. *Stallings* v. *Splain*, 253 U. S. 339, 343.

A true copy.

(S) D. E. ROBERTS, *Clerk*.

APPENDIX C

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, City, County and State of New York, on the 8th day of April 1942

Present: Honorable Learned Hand, Honorable Thomas W. Swan, United States Circuit Court Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GENE MCCANN, DEFENDANT-APPELLANT

Order

Upon the annexed petition of Gene McCann, the defendant-appellant herein; upon the decision of this Court, dated March 27th 1942, granting his application for a writ of habeas corpus and directing that he be discharged; upon the order of this Court, dated March 31st 1942, made and entered upon the said decision and directing that the defendant-appellant be forthwith released from custody upon condition that he post bail in the amount of $1,000.00 to secure his appearance to prosecute his appeal herein and for the further trial and prosecution upon the indictment; upon the Act of Congress of February 11th 1938, authorizing and directing the Wardens of the places wherein Federal prisoners are held in custody to

480526—42——5

administer oaths of such prisoners upon papers to be filed in Federal Courts; upon Rule 15 of the General Rules of this Court; and sufficient reason appearing therefor, it hereby is

ORDERED that the time within which the defendant-appellant herein can serve and file an amended assignment of errors and perfect, settle, and file his bill of exceptions and record on appeal in the Court below and in this Court and for all other purposes be and the same hereby is extended for a period of ninety (90) days from the personal service on the defendant-appellant of a copy of any order that may be made by the United States Supreme Court reversing the aforesaid order of this Court which granted the defendant-appellant's writ of habeas corpus and directed his discharge.

(Sgd.) LEARNED HAND,
(Sgd.) THOMAS W. SWAN,
C. JJ.

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
GENE MCCANN, DEFENDANT-APPELLANT

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

GREETINGS:

GENE MCCANN, the defendant-appellant in the above-entitled cause respectfully shows as follows:

1. On February 18th 1941 an indictment was returned against me by the January 1941 Grand Jury for the District Court for the Southern District of New York. The indictment charges six distinct violations of Section 338, Title 18, U. S. Code—using the mails to defraud. The cause came on for trial on July 7th 1941 before the Honorable Merrill E. Otis, District Court Judge from Missouri, presiding as a visiting Judge in the Southern District of New York. On July 22nd 1941, I was found guilty on all counts by the said Judge, presiding without a Jury, and sentenced to a total of six years and a $600.00 fine.

2. On July 28th 1941, the 27th having fallen on a Sunday, I duly served and filed a notice of appeal.

3. Under respective orders of this and the Court below, the Term of this and of that Court and the time within which I can perfect said appeal and for all other purposes has been duly extended to May 9th 1942.

4. In a decision by this Court, dated March 27th 1942, it granted my application for a writ of habeas corpus wherein it directed that I be discharged and on March 31st 1942 an order was made by this Court upon said decision directing that I be forthwith discharged from custody upon condition that I post bail in the amount of $1,000.00 to secure my appearance to prosecute my appeal herein and for the further trial and prosecution upon the indictment.

5. I defended this cause and was prosecuting the appeal therein in person. Pursuant to respective orders of the Court below and of this Court I defended and was prosecuting the appeal as a poor person. I am unable to post or secure the bond required for my release from custody.

6. The United States Attorney has informed this Court that he is seeking permission of the Attorney General to file a petition for certiorari in the Supreme Court with respect to this Court's decision granting my application for a writ of habeas corpus and directing that I be discharged.

7. In the event the Supreme Court denies the certiorari and or thereafter affirms the decision of this Court the perfection of my appeal herein will be unnecessary.

8. At the place of my custody, I am denied the use of a stapler, the use of pen and ink and access to a Notary Public or Warden before whom I can acknowledge this petition, the latter required by the Act of Congress of February 11, 1938, authorizing and directing the Wardens of places wherein Federal prisoners are held in custody to administer oaths for such prisoners in connection with papers to be filed in Federal Courts.

WHEREFORE, I respectfully pray that this Court, upon my indelible pencil signature affixed hereto, make the annexed order, pursuant to its General Rule 15, and direct its Clerk to staple the pages together and mail a certified copy thereof to me

that I may cause the same to be filed in the office of the Clerk of the Court below.

Dated, New York, N. Y., April 7th 1942.

(Sgd.) GENE McCANN,
Gene McCann,

Defendant-Appellant pro se., City Prison of Manhattan,
Fourth Floor, 125 White Street, New York City.

COUNTY OF NEW YORK,
State of New York, ss:

GENE McCANN, being duly sworn, deposes and says: I have made, read and know the contents of the aforesaid petition and the same is true of my own knowledge.

Sworn to before me this —— day of April 1942.

(Sgd.) GENE McCANN,
Gene McCann.

APPENDIX D

United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, EX REL GENE MCCANN, PETITIONER, FOR A WRIT OF HABEAS CORPUS

v.

WILLIAM A. ADAMS, WARDEN OF CITY PRISON OF MANHATTAN, 125 WHITE STREET, NEW YORK CITY, AND/OR THE UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, RESPONDENTS

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

GREETINGS:

The Petitioner, Gene McCann, respectfully shows and alleges:

FIRST: That your petitioner was indicted on or about February 18th, 1941, by the Grand Jury in the District Court of the United States in and for the Southern District of New York, charging six distinct violations of Title 18, Section 338, of the U. S. Code, to wit, using mails to defraud. The matter came on for trial on July 7th, 1941, before the Honorable Merrill E. Otis, District Court Judge from Missouri, presiding as a visiting judge in the Southern District of New York. On July 22nd, 1941, your petitioner was found

guilty by the aforesaid Judge without a jury on all counts and was sentenced to a term of three years on each of the first three counts to run concurrently and three years on each of the last three counts to run concurrently with each other but not concurrently with the sentence on the first three counts. In effect, the total sentence amounts to six years and a fine of $600.00.

SECOND: That at no time during all of the aforesaid proceedings in connection with the aforesaid matter was your petitioner advised or apprized by the Court, Judge Otis, the United States Attorney nor by anyone else, nor was the petitioner aware of his statutory and constitutional rights to the assistance and advice of counsel, nor did the petitioner at any time expressly or impliedly waive such rights or assistance of counsel, nor did the Court below or Judge Otis at any time offer to assign counsel to assist the petitioner in the defense of the felonies charged in the indictment, or advise petitioner that he should or could have counsel therefor. Your petitioner appeared before the Court in all of the proceedings and proceeded to trial without the benefit or protection of counsel and ignorant of his right to the same, and sought to establish his innocence to the best of his ability, because of his inability to defray the cost of competent counsel.

THIRD: That on or about July 7th, 1941, at the commencement of the trial aforesaid before Judge Merrill E. Otis, your petitioner waived a jury trial upon the indictment aforesaid, charging the felonies aforesaid, and proceeded to trial without a jury. That an extract from the Court Clerk's

Minutes of the proceedings upon the trial of this cause reveals the following:

July 7th, 1941: Room 318.
Mathias F. Correa, U. S. Attorney, by Richard J. Burke.
Gene McCann, Pro se.
Honorable Merrill E. Otis, District Court Judge, Presiding.

Defendant moves to waive trial by jury and the Court to decide issues of fact. Motion Granted on consent of U. S. Attorney.

Your petitioner personally, and without the aid and advice of counsel, and without the aid or advice of the United States Attorney or the Assistant thereof, and without the aid or advice of the Trial Judge or anybody else, consented to the waiver of a jury trial and proceeded to trial and conviction and sentence without a jury. Your petitioner signed a stipulation waiving a jury trial but was never advised either of his rights or of the significance of his acts. The proceedings had in connection therewith were extremely perfunctory. Judge Otis without familiarizing himself with the gravemen of the case or of the defense or of the serious nature of the charge confronting the petitioner ordered a waiver of a jury trial and permitted your petitioner to proceed to trial without counsel or the assistance of counsel and without a jury. The aforesaid Judge did not advise your petitioner of any statutory or constitutional rights to counsel and to a trial by jury with all the traditional safeguards incidental thereto, nor was your petitioner sufficiently familiar with all the facts or in a position where your petitioner could make an intelli-

gent determination. The waiver was permitted by the trial court as a mere matter of rote without the exercise of sound and advised discretion, necessary to sanction such an unreasonable and undue departure from the mode of trial by jury, normal in cases of this character.

FOURTH: Your petitioner submits that the failure to advise your petitioner of his right to counsel violated the principle set forth in Johnson v. Herbst, 304 U. S. 458, and that your petitioner at no time waived the right to counsel. It is further submitted that the conditions precedent necessary to waive a jury in a felony case as set forth in Patton vs. United States, 281 U. S. 276, were not complied with and that the alleged waiver of the jury was ineffectual and that all proceedings had in connection with the instant indictment, to wit, the trial without a jury, the judgment of conviction and sentence were a nullity.

FIFTH: That the cause or pretense of such imprisonment of petitioner is the aforesaid Judgment of Conviction and Sentence thereon; that the said confinement, imprisonment and restraint are illegal and that the same deprives the petitioner of his liberty without due process of law and the detention is violative of the prisoner's rights to his liberty pursuant to the Constitution of the United States and the State of New York wherein he is now detained; that the order of committment and the confinement and detention are void and illegal and violates the provisions of the Federal and State Constitutions relative to due process of law.

SIXTH: That no application for a Writ of Habeas Corpus on the grounds stated herein has been made.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus issue herein directed to the persons mentioned above, and that upon the return thereof an order be made herein directing that the petitioner be released from his imprisonment and custody of the United States officers now detaining him.

GENE MCCANN.

Witnessed by Mary Joy.

STATE OF NEW YORK,
County of New York, ss:

MARY JOY, being duly sworn, deposes and says that she resides at 683 East 140th Street, in the Borough of Bronx, City and State of New York.

That she is over the age of 21 years, and that she is a stenographer in the office of Frank J. Walsh, Esq., attorney for petitioner in the within proceeding. That on the 12th day of March 1942, at the City Prison of Manhattan, located at 125 White Street, New York, she saw petitioner Gene McCann sign the within petition. That deponent states that the signature affixed to said petition is a genuine signature of Gene McCann, the petitioner herein.

MARY JOY.

Sworn to before me this 12th day of March, 1942.

CHARLES CAVANNA,
Notary Public, N. Y. County.

Comm. Expires March 30, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942